IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 233

JAMES J. WALDRON,

Petitioner,

—against—

MOORE-McCORMACK LINES, INC.,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

Petitioner's brief (pp. 1-2) adequately sets forth the citation of the Court of Appeals' opinion below, the fact that the District Court's opinion is unreported, and the jurisdictional requisites.

Question Presented

If all other crewmembers are busy performing other urgent tasks necessary to dock a vessel which is subject to the manning requirements of 46 U.S.C.A. § 222, does vacuous hindsight opinion testimony that additional sailors should have been assigned to assist two able-bodied seamen execute a non-negligent last minute order to put out another mooring line raise a jury question of whether the fully, properly, competently manned ship was unseaworthy, there being no defect in the vessel's hull, appurtenances, or equipment?

Statute Involved

46 U.S.C.A. § 222 (hereinafter fully set forth in Appendix A) requires that a vessel of the class here involved "shall have in her service and on board such complement of licensed officers and crew * * * as may in the judgment of the Coast Guard be necessary for her safe navigation."

Statement

Petitioner, "an able seaman and member of the crew of the SS Mormacwind" (R 63), was injured during the "very good" (R 48) "11 minutes" (R 64) docking of respondent's ship.

"According to the Coast Guard certificate [issued pursuant to 46 U.S.C.A. § 222], the vessel was only required to carry on deck in the unlicensed department six able and three ordinary seamen; and in addition to the six able and three ordinary seamen she had a boatswain and two deck utility men. Her articles thus showed that she had three more unlicensed deck crewmen than her certificate required. At the time of the alleged accident, the vessel had on board every one of the deck crew shown on the articles." (R 61)

The ship was docked "between 1:20 and 1:31 P.M." (R 64) and "the full complement on the aft docking station during those hours would consist of five unlicensed members of the deck department under the command of the third officer, the five normally being three able and two ordinary seamen." (R 61) Since one of those ordinary seamen "was in the ship's hospital" (R 18), he was replaced by an experienced able seaman (R 16-17) who, in addition to his superior rating, "was exceptionally strong and capable" (R 64). "At

the time of the alleged accident and for some time prior thereto, there were five unlicensed men at the aft docking station, consisting of four able-bodied seamen and one ordinary seaman; thus the place of one ordinary seaman had been taken by an able-bodied seaman." (R 61)

"It is not disputed that the vessel was properly and fully manned and that the crew including the [third] officer who gave the order were in all respects competent to perform their duties. * * * nor is there any claim of a defect in the vessel or any of its gear, equipment and appliances." (R 63-64)

At first, petitioner and "one man assisting" (R 5) put out "a couple of [mooring] lines going through the aft chock" (R 4), during which time "Nothing unusual" occurred (R 4). "As the [docking] operation progressed with the requisite dispatch" (R 64) and because of "a last minute decision of the pier master as the vessel was finally being placed in position" (R 59), "the officer on the bridge decided another mooring line was necessary as a spring line and the order was passed on to [the third officer in charge of the aft docking station]. As all the other men were occupied with urgent tasks connected with other lines, [the third officer] assigned to [petitioner] and another able seaman, who was exceptionally strong and capable, the task of putting out this new line 'as quickly as possible'." (R 64)

The additional spring line was "new manila line" (R 20) "eight inches in circumference" (R 7) and "was coiled on a grating on the deck * * * approximately 56 feet away" (R 63) from the chock through which it was let out. After the other able seaman proceeded to the chock with the eye and a 15 feet bight of line on his shoulders (R 64-65), petitioner "was tugging at the top of the coil, attempting to

flake some slack along the deck, when he slipped and fell." (R 65) Although petitioner asserts without supporting reference that 56 feet of 8 inch manila line weigh 104.72 pounds (brief, p. 3), there is no evidence or reasonable inference that petitioner and the other able seaman, either jointly or singly, were hauling or carrying anything approaching 56 feet of line when petitioner slipped and fell "perhaps ten feet" (R 10) from the coiled line.

Petitioner claimed that the deck was unseaworthy and that the third officer was negligent in failing to order more men to help put out the additional line. "The issue of negligence and several features of the issue of unseaworthiness, as claimed by [petitioner], were submitted to a jury who returned a [general] verdict for [respondent]." (R 63) "The findings implicit in the verdict are: (1) that the order given by the third mate was not a negligent order, that is to say, [petitioner] failed to convince the jury that under the circumstances a reasonably prudent man would not have given such an order; and (2) that the vessel was not unseaworthy because the deck was tacky from wet paint or was wet and slippery." (R 64)

Petitioner also claimed "that the condition which resulted from the third mate's apportioning of the men, i.e., two men assigned to do the work of three ([petitioner's] expert testified that it was his opinion that the work ordered done was a three-four man job), regardless of whether the order was improvident or not, constituted unseaworthiness." (R 61) The District Court "directed a verdict for the [respondent] on that claim" (R 61) and a majority of the Circuit Court affirmed (R 65), holding that: "With respect to the crew, including the officers, all that is or has been required is that the vessel be properly manned.

That is to say, in order to be 'reasonably suitable for her intended service' the vessel must be manned by an adequate and proper number of men who know their business. There is no requirement that no one shall ever make a mistake. If someone is injured solely by reason of an act or omission on the part of any member of a crew found to be possessed of the competence of men of his calling, there can be no recovery unless the act or omission is proved to be negligent. We have found no authority to the contrary. Indeed, this rule seems to us to be based not only on a uniform course of judicial opinion but also on sound reason. In the management of the vessel both at sea and in port, moments of lesser or greater urgency are bound to occur when quick decisions have to be made, and there is always the possibility of what may appear by way of hindsight to be errors of judgment. To alter this rule, in the absence of legislation, would, we think, come close to requiring the shipowner to provide 'an accident proof' ship, which the teachings of Mr. Justice Stewart's landmark and highly clarifying opinion in *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U.S. 539, 550, *supra,* specifically negates." (R 69-70)

Petitioner's brief distorts the record by quoting testimony out of context to induce a mistaken belief that petitioner's expert testified that the third mate's 2 men order was an "unsafe operation" (brief, pp. 3-4). This opinion testimony related solely to petitioner's claim, which the jury decided in respondent's favor, that "with regard to the preparation for the docking operation" (R 37), the additional line should have been flaked out of the coil and alongside the chock before the operation began (R 35-38).

Petitioner's brief also exceeds the record by repeatedly inferring nonexistent expert testimony that the mate's or-

der created a "dangerous", "unsafe condition" resulting from "nonuse or misuse" of "available" ship's personnel. The Circuit Court emphasized by quotation (R 63) that the opinion testimony concerning the propriety of the mate's order was elicited solely by questions employing the phrase "safe and prudent seamanship" (R 27, 33, 42, 46). The Circuit Court also emphasized (R 65) the vacuousness of this opinion testimony, which specifically excluded (R 46) the effect "of twenty-five common factors which the person in charge of this operation would necessarily have to take into consideration in order to safely dock the ship [even though] those factors would have a bearing upon whether what the mate did was safe, prudent and seamanlike" (R 45).

Summary of Argument

The Court has never decided the question presented. Based on "a uniform course of judicial opinion" and "sound reason" (R 69), several lower courts have decided the question in favor of shipowners and there is "no authority to the contrary". (R 69) Since 46 U.S.C.A. § 222 empowers the Coast Guard to fix the crew complement necessary for safe navigation of vessels, which the Coast Guard has done by comprehensive Manning Requirements, 46 C.F.R. Part 157, "after a thorough consideration of • • • the many factors involved", 46 C.F.R. § 157.15-1(b), a contrary determination would "come close to requiring the shipowner to provide 'an accident proof' ship". (R 69)

Argument

Petitioner's brief (p. 25) correctly states that "the issue of whether unseaworthiness liability may be found for shortage of personnel for a particular task on an otherwise fully manned vessel has never been dealt with directly by this Court", and goes on to say that: "Except for the instant case, it has been determined directly in only two lower court decisions. These are *American President Lines, Ltd.* v. *Redfern,* 345 F. 2d 629 (9th Cir. 1965), decided in favor of the seaman, and *The Magdapur,* 3 F. Supp. 971 (S.D.N.Y. 1933), decided in favor of the shipowner." The question was also dealt with in *Koleris* v. *S.S. Good Hope,* 241 F. Supp. 967, 970 (E.D. Va. 1965), and *Mable* v. *Matson Navigation Co.,* 1963 A.M.C. 925 (N.D. Cal. 1963), both decided in favor of the shipowner.

A majority of the court below "found no authority to the contrary" (R 69), including *American President Lines, Ltd.* v. *Redfern, supra,* which involved "a stuck valve that could only be 'broken' by the use of tools or several men working together." (R 68) That *Redfern* concerned basically unseaworthy equipment is made indisputably clear by the unreported memorandum opinion of the Northern District of California Court (hereinafter set forth in Appendix B) which, without reference to any claimed lack of tools or manpower, simply held "that the vessel herein is unseaworthy in that the low sea suction valve on the port side was stuck or frozen, constituting an unseaworthy condition of the ship's equipment". On appeal, the Ninth Circuit Court undertook to construe "Redfern's proposed findings [which] were adopted without any changes by the court. They contain many confusing and ambiguous state-

ments; they go beyond the clear import of the memorandum * * *. In substance, the critical findings are that opening a stuck sea valve, like the one involved in this case, is a hazardous operation, unless performed by two men or a single man using adequate tools * * *. A stuck sea valve, the trial judge found * * * is suitable only if operated by two men; otherwise, it [i.e., the stuck valve] constitutes a dangerous condition." 345 F. 2d, pp. 630-631.

Here, there is no testimony to support any finding that the additional spring line was "reasonably suitable for [its] *intended* service", *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960), [italics added], only if handled by more than two able-bodied seamen. Indeed, if there had been any such evidence, use of only two sailors to put out the line would not have made the *new manila line* any less fit for its intended purpose, but would have constituted an attempt to use the line for an *unintended* purpose. If a mate improvidently ordered a seaman to paint the deck with a new hammer, the hammer would not be transformed into an unseaworthy tool since it was not intended to be used as a paint brush.

Seeking to thrust his case within the penumbra of decisional law, petitioner's point I cites cases involving negligent failure to provide available safe gear which resulted in use of unsuitable gear, and petitioner's point II cites cases involving negligent use of sound gear in a manner which created an unseaworthy condition. Neither group of citations is apposite. There was no evidence, or even a claim, that the new manila spring line was less than reasonably fit for its intended use or that there was any other available method of putting out the line, and the jury found that the mate's order directing the manner in which the line was to be put out was not negligent.

Petitioner's claim is similar to one in *Pinto* v. *States Marine Corporation of Delaware*, 296 F. 2d 1 (2 Cir. 1961), cert. denied 369 U.S. 843 (1962), upon which both courts below relied (R 61-62, 70-71). There, "the third mate directed Pinto and a helper Fantroy, to carry a heavy signal light from the wheel-house to the engine room * * *. [Plaintiff claimed] 'operating' unseaworthiness, in that some other method should have been adopted for conveying the light to the engine room, * * * [plaintiff's expert having testified] that in fact 'it was unsafe to take anything down as heavy as the light without the aid of a block and fall.'" 296 F. 2d, p. 2 The Court rejected plaintiff's contention that "the work procedure" constituted unseaworthiness and held that "plaintiff, under his claim of 'operating' unseaworthiness, was entitled to raise only the mate's overall competence". 296 F. 2d, p. 3

As the court below held, it "is inherent in the traditional triple concept of unseaworthiness [that w]ith respect to the crew, including the officers, all that is or has been required is that the vessel be properly manned." (R 69) Thus, in *June T., Inc.* v. *King*, 290 F. 2d 404 (5 Cir. 1961), misrelied upon in *American President Lines, Ltd.* v. *Redfern, supra*, 345 F. 2d, p. 632, a shrimp boat which normally had a 3 man crew was held unseaworthy when crewed by only 2 men. *In re Pacific Mail S.S. Co.*, 130 Fed. 76, 82 (9 Cir., 1904), held a vessel unseaworthy because her Chinese sailors could not understand the orders of their English-speaking officers and were, therefore, "incompetent". *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U.S. 336, 337 (1955), modified 350 U.S. 811 (1955), and *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 518 (2 Cir. 1952), cert. denied 343 U.S. 966 (1952), held that a ship might

be unseaworthy due to the presence of a crewmember who was not "equal in disposition and seamanship to the ordinary men in the calling."

Nothing comparable exists in this case. The vessel had more sailors aboard than her Coast Guard certificate required and there is no claim or evidence that any member of the crew was incompetent.

In addition to warping soundly conceived jurisprudence, a decision that a fully, competently manned ship could be found unseaworthy because of hindsight testimony that otherwise occupied crew members should have been ordered to assist in executing a last minute decision to put out another docking line would be incompatible with 46 U.S.C.A. § 222 and implementing Coast Guard regulations.

46 U.S.C.A. § 222 requires that a vessel of the class here involved "shall have in her service and on board such complement of licensed officers and crew • • • as may in the judgment of the Coast Guard be necessary for her safe navigation." "The express purpose of 46 U.S.C.A. § 222 is that of promoting 'safe navigation', upon which standard the Coast Guard is required to exercise its judgment in determining the 'necessary' complement of a vessel's crew and officers." *Pierro* v. *Carnegie-Illinois Steel Corp.*, 186 F. 2d 75, 78, fn. 5 (3 Cir. 1950).

Pursuant to 46 U.S.C.A. § 222, the Coast Guard has promulgated comprehensive "Manning Requirements", 46 C.F.R. Part 157, including "the minimum complement of officers and crew necessary for the safe navigation of the vessels", 46 C.F.R. § 157.15-1(a), as "determined by the Officer in Charge, Marine Inspection, after a thorough consideration of the applicable laws cited in § 157.01-10(b) and

the regulations in this part together with the many factors involved, such as size, type, proposed routes of operation, cargo carried, type of business in which employed, etc." 46 C.F.R. § 157.15-1(b).

Thus, with respect to the complement necessary to safely man its vessels, Congress has relieved the shipowner of "the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it", *Time, Inc.* v. *Hill*, —— U.S. ——, 35 LW 4108, 4112-4113 (January 9, 1967). Instead of being exposed to the unpredictable consequences of vacuous second guessing by "experts" retained by their opponents, cf., *Central Railroad Co. of New Jersey* v. *Tug Marie J. Turecamo*, 238 F. Supp. 145, 148 (E.D.N.Y. 1965), shipowners can rely upon the Coast Guard to fix safe manning scales "after thorough consideration" of "the many factors involved".

As the court below recognized, a contrary decision would "come close to requiring the shipowner to provide 'an accident proof' ship, which the teachings of Mr. Justice Stewart's landmark and highly clarifying opinion in *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U.S. 539, 550, *supra*, specifically negates." (R 69-70) Apart from physical defects, undermanning, or an incompetent crew, the only likely cause of shipboard injury to a seaman is as the result of carrying out an order. If an order, to say nothing of a non-negligent order, can make the vessel unseaworthy even though there is no deficiency of hull, gear, or personnel, then there would be no accident for which a seaman could not obtain a verdict for damages, particularly as there will never be a shortage of litigation "experts" who can be induced to countermand any order.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

WILLIAM M. KIMBALL
Counsel for Respondent

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APPENDIX A

46 U.S.C.A. § 222.

No vessel of the United States subject to the provisions of title 52 of the Revised Statutes or to the inspection laws of the United States shall be navigated unless she shall have in her service and on board such complement of licensed officers and crew including certificated lifeboat men, separately stated, as may in the judgment of the Coast Guard be necessary for her safe navigation. The Coast Guard shall make in the certificate of inspection of the vessel an entry of such complement of officers and crew including certificated lifeboat men, separately stated, which may be changed from time to time by indorsement on such certificate by the Coast Guard by reason of change of conditions or employment. Such entry or indorsement shall be subject to a right of appeal, under regulations to be made by the Commandant of the Coast Guard, to the Commandant of the Coast Guard, who shall have the power to revise, set aside, or affirm the said determination.

If any such vessel is deprived of the services of any number of the crew including certificated lifeboat men, separately stated, without the consent, fault, or collusion of the master, owner, or any person interested in the vessel, the vessel may proceed on her voyage if, in the judgment of the master, she is sufficiently manned for such voyage: *Provided,* That the master shall ship, if obtainable, a number equal to the number of those whose services he has been deprived of by desertion or casualty, who must be of the same grade or of a higher rating with those whose places they fill. If the master shall fail to explain in writing the cause of such deficiency in the crew including cer-

tificated lifeboat men, separately stated, to the Coast Guard within twelve hours of the time of the arrival of the vessel at her destination, he shall be liable to a penalty of $50. If the vessel shall not be manned as provided in this section, the owner shall be liable to a penalty of $100, or in case of an insufficient number of licensed officers to a penalty of $500. R.S. § 4463; Apr. 2, 1908, c. 123, § 1, 35 Stat. 55; Mar. 3, 1913, c. 118, § 1, 37 Stat. 732; Mar. 4, 1915, c. 153, § 14, 38 Stat. 1182; May 11, 1918, c. 72, § 1, 40 Stat. 548; June 30, 1932, c. 314, § 501, 47 Stat. 415; May 27, 1936, c. 463, § 1, 49 Stat. 1380; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

IN ADMIRALTY

No. 28393

JOHN REDFERN,

Libelant,

vs.

AMERICAN PRESIDENT LINES, LTD., a corporation,

Respondent.

MEMORANDUM OPINION

This is an action by libelant in Admiralty against American President Lines, Ltd., owner and operator of the S.S. PRESIDENT HOOVER, for damages and personal injuries sustained by libelant, a seaman, while a crew member of the ship.

Libelant's complaint is two counts:

1. Unseaworthiness of the vessel, and,

2. Negligence of the ship owner.

Jurisdiction herein is in Admiralty under the General Maritime Law and under the Jones Act.

The Court is of the opinion that the vessel herein is unseaworthy in that the low sea suction valve on the port side was stuck or frozen, constituting an unseaworthy condition of the ship's equipment; that this unseaworthy condition was the cause of libelant's injuries herein and libelant was not contributorily negligent and received physical injuries resulting in the following damages:

1. Actual wage loss to date	$ 8,000.00
2. Loss of future wages (Partial loss of 33⅓%, based on annual wage of $4,500 for work expectancy of 16 years = $24,000, discounted to present value at 4%)	17,478.00
3. Pain and suffering	15,000.00
Total	$40,478.00

Libelant herein is to recover costs. Counsel for libelant is to prepare Findings of Fact, Conclusions of Law, and Decree.

Dated: December 4, 1963.

/s/ ALBERT C. WOLLENBERG
United States District Judge

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